United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

74-1389

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

-against-

ERNEST MALIZIA,

Defendant-Appellant.

On Appeal From The United States District Court For The Southern District of New York

APPELLANT'S BRIEF

GOLDBERGER, FELDMAN & BREITBART
Attorneys for Appellant
401 Broadway, Suite 306
New York, N.Y. 10013
(212) 925-2105

J. JEFFREY WEISENFELD
On the Brief

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

-against-

ERNEST MALIZIA,
Appellant.

STATEMENT OF ISSUES

1.

Whether the admission into evidence of testimony that the non-testifying informer was afraid of being killed; of Malizia having been a target of ''Operation Flanker''; and of Malizia's fingerprint record with the Bureau of Narcotics and Dangerous Drugs, constituted prejudicial error.

2.

Whether the District Court's instruction to the jury that the case must be decided was prejudicial error.

3.

Whether the introduction of evidence pertaining to Malizia's flight was prejudicial error.

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction in the United States District Court for the Southern District of New York, Honorable Constance Baker Motley,

District Judge. The indictment against Malizia contained three counts, but only the second count was presented to the jury.

On February 15, 1974, a jury found Ernest Malizia guilty of a violation of Title 21, U.S.C., Sections 173 and 174. On March 19, 1974, Malizia was sentenced to a prison term of ten years imprisonment.

STATEMENT OF FACTS

Prior to trial, a hearing was held on appellant's motion to determine whether the prosecution should be permitted to introduce evidence of appellant's flight. Appellant's motion was denied and the government introduced such evidence at trial.

The government charged that on February 17, 1970, Malizia sold cocaine to a government informer named Gerstenfeld.

The Government's Case

On February 16, 1970, Agent Leonard Vecchione met with Gerstenfeld and instructed him to complete his negotiations to purchase drugs from Malizia. (18)* On February 17, 1971, Vecchione had Agent James King take $16,500.00 and serialized it and prepare it for the sale (19). At about 6:00-6:30 p.m., Vecchione met

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*References are to the typewritten transcript of trial.

with the rest of the surveillance team. He instructed them as to their various surveillance assignments (19). Vecchione and Edward Kayner then went to Park Place and Church Street and met with Gerstenfeld. The informant was searched for contraband and none was found (20).

The informant was then instructed to get into a cab driven by George Gross, a New York State police officer (21). Gerstenfeld got into the cab. Vecchione gave the $16,500.00, in a brown paper bag, to Gross, with instructions to give it to Gerstenfeld when they arrived at the arranged location of the sale; Christine's Luncheonette on Pleasant Avenue in Manhattan (22). The cab then drove to Christine's (24). Vecchione and Kayner followed right behind (24). At about 9:15 p.m. they arrived in front of Christine's. The cab pulled up to the curb in front of the luncheonette and Gerstenfeld got out and went in. Vecchione and Kayner pulled up along side of the cab (160, 227-228) Gerstenfeld sat at the counter. Malizia was behind the counter (25-27, 204). Gerstenfeld handed Malizia a brown paper bag (25-27, 159, 258). Malizia had some money in his hand and appeared to be counting it (27, 160, 161). Malizia came out from behind the counter, lifted up Gerstenfeld's jacket and placed a package between Gerstenfeld's belt and the area of the small of his back and then pulled the jacket

down (162). Gerstenfeld left Christine's and went to a pre-arranged location, where the package was taken from him. The package was found to contain cocaine (34, 167).

After the sale, Malizia left Christine's and went to 118th Street. A man who looked like Malizia placed a package in the trunk of a Pontiac which was registered to Rose Malizia, the sister-in-law of appellant (310, 319).

Over defense objection, there was further testimony that on February 24, 1971, as a part of a Bureau of Narcotics and Dangerous Drugs operation, entitled ''Operation Flanker'', John Malizia, appellant's brother was arrested (168, 329). On February 24 and February 25, first attempts were made to arrest Ernest Malizia. Agents went to his home and spoke to his family. They returned several times but to no avail. A surveillance was placed on Malizia's home. A surveillance was also placed on Malizia's mother's home on Long Island. Malizia was never seen during this time (389-398).

There was no evidence that Malizia was ever informed that he was wanted by the government (399, 401).

In early December of 1971, Malizia was arrested in Rockland County on a traffic violation. When arrested, he showed a false identification in the name of John Conite. Malizia was taken to court and bail was set at $1,000.00. Malizia never returned to court, nor did

he attempt to recover the car in which he had been riding (401-411, 414-416).

On December 18, 1973, Malizia was arrested. At the time of his arrest, he was carrying identification in the name of Harry Luppes (420-424).

Gerstenfeld was not called as a witness. Vecchione testified that efforts had been made to locate him, but they were unsuccessful (41-42). From the beginning, Gerstenfeld told Vecchione he would not testify against Malizia (67). Over strenuous objections, (42-46) Vecchione was permitted to testify that some months after this sale, he spoke to Gerstenfeld about testifying in this case. Gerstenfeld told him that ''he would never testify because he was in fear of being killed'' (46).

Edward Kayner testified that he checked the package of cocaine for fingerprints. From the innermost wrapping he retrieved a partial print. He took a fingerprint card of Ernest Malizia's which was kept at the Bureau of Narcotics and Dangerous Drugs and had it checked against the partial print. No fingerprint identification could, however, be made (266). This occurred on February 19, 1971 (377-378).

Defendant's Case

Harry Peters, the owner of Christine's at the time of the sale, stated that the agents could not

have seen into his luncheonette because the window through which these observations were made was right in front of a grill and was always foggy and covered with grease (455).

Furthermore, no one, including Malizia, was ever allowed to be in the luncheonette in the absence of Mr. Peters or his wife (451). Other than the Peters, no one was ever allowed behind the counter (450-451).

Mrs. Peters corroborated the testimony of her husband (493-495).

ARGUMENT

POINT I

THE ADMISSION INTO EVIDENCE OF THE INFORMANT'S FEAR OF APPELLANT; OF APPELLANT'S HAVING BEEN ONE OF THE SUBJECTS OF ''OPERATION FLANKER''; AND OF APPELLANT'S FINGERPRINT RECORD WITH THE BUREAU OF NARCOTICS AND DANGEROUS DRUGS, REQUIRE REVERSAL OF HIS CONVICTION.

During this trial, the government introduced the testimony of Agent Vecchione who stated that the informant, Gerstenfeld, had told him that he would never testify against appellant because he was afraid of being killed.[1] Defense counsel objected, but was overruled. The issue was clearly presented to the court by defense counsel (44-45).

The government also introduced testimony that on February 24 and 25, 1971, appellant and his brothers were the subject of a government round-up entitled ''Operation Flanker''.[2] Again, this was over defense objection.

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1. Testimony of Leonard Vecchione:
   Q. Did he tell you at that time what his state of mind was with respect to testifying and whether he would ever testify?
   A. Yes, sir.
   The informant said that he would never testify because he was in fear of being killed. (46)

2. Testimony of George Gross (168) and Donald Pinto (329).

Finally, the government elicited testimony which referred to appellant's fingerprints being on file at the Bureau of Narcotics and Dangerous Drugs.[3] No objection was taken to this testimony.

Appellant contends that each of the above by itself requires reversal. They are treated as one point because they supplement each other and the type of prejudice they wrought is similar.

The Informant's fears of appellant

Gerstenfeld was not a witness during the trial. In order to ward off a defense argument based on this, the government offered testimony to explain Gerstenfeld's absence.

Judge Motley asked defense counsel if he intended to make an issue of Gerstenfeld's absence. Counsel replied that he would only raise it in the context of the government's general burden to prove guilt beyond a reasonable doubt. (45) Evidently, Judge Motley felt that counsel's

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3. Testimony of Edward Kayner (266)
   Q. Did you take comparison fingerprints with you?
   A. I brought three cards with me from the Federal Bureau of Narcotics.
   Q. Was among those cards Mr. Malizia?
   A. Yes, sir.
and Testimony of James King (378)
   A. Now, he got a partial print on 2C and at that time I turned it over to Investigator Kayner along with a fingerprint card of Ernest Malizia, to be brought to the New York State Police Laboratory for further comparison and identification.

answer indicated the need to allow the government to explain why Gerstenfeld was not produced at trial. The government then proceeded to elicit testimony to the effect that Gerstenfeld was not in custody, not in any way under the control of the government, and that efforts to locate him were unsuccessful. Not being satisfied with just this, the prosecution asked the following:

> Q. Did he tell you at that time what his state of mind was with respect to testifying and whether he would ever testify?
>
> A. Yes, sir. The informant said that he would never testify because he was in fear of being killed. (46)

A vigorous objection[4] by counsel was overruled on the grounds that this testimony was not hearsay, since it went only to the state of mind of the missing informant and that its probative value outweighed its prejudice to appellant.

Even if the characterization of this as an exception to the hearsay rule is correct, it was still error to admit it into evidence.

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4. Defense counsel previously objected to this testimony when the government initially made its offer of proof to the court (42-45). This issue was clearly understood by the court. cf. United States v. Garelle, 438 F.2d 366, 372 n.17 (2d Cir., 1970) cert. dismissed, 401 U.S. 907.

This presents a clear example of prejudice far outweighing any probative value. The testimony that Gerstenfeld was afraid of being killed was entirely unnecessary for the purpose used. No party is required to produce a witness which it cannot find. 2 Wigmore on Evidence, §286 (3d Ed. 1940); Case v. New York Central Railroad Co., 329 F.2d 936 (2d Cir., 1964). It was proper for the prosecution to show that it had attempted to find Gerstenfeld and failed. This effectively closed any argument based on his absence. United States v. Young, 463 F.2d 934, 939-40 (CADC, 1972); Wynn v. United States, 397 F.2d 621, 625 (CADC, 1967), 2 Wigmore, supra, §286.

Surely, in light of the facts, appellant was not entitled to a ''missing witness'' charge.[5] United States v. Craven, 458 F.2d 802 (CADC 1972); United States v. Free, 437 F.2d 631, 635-36 (CADC, 1970); United States v. Dixon, 469 F.2d 940, 942 n.4 (CADC, 1972); United States v. Noah, 475 F.2d 688, 691 (9th Cir., 1973); United States v. Makekau, 429 F.2d 1403, 1404 (9th Cir. 1970), cert. denied 400 U.S. 904. But, the government pressed on and went far beyond permissible limits. To

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5. None was ever requested.

have allowed this testimony was wrong. Wrong by any standard.

The state of mind of Gerstenfeld was virtually irrelevant to the issue of the failure of the government to call him. It was the fact that he was missing and that attempts to find him had been made which closed the issue. The operation of Gerstenfeld's mind added nothing except prejudice to Malizia. It was Gerstenfeld's unavailability and the fact that this was not in any way attributable to the government which were significant, not the state of mind which led to it. 2 Wigmore, supra s286; Case v. New York Central Railroad Co., supra.

Vecchione's own testimony bears this out. As he put it, there are many times that a witness says he is unwilling to appear but this often changes.

That this fear of being killed was not the result of a direct threat made to Gerstenfeld makes matters even worse. For by allowing this testimony in, the jury was clearly informed that appellant was the type of person who by general reputation alone, caused fear of death in those who opposed him. This is insidious. If a direct threat had been made, it could possibly be explained as momentary or caused by anger and not a true indication of the nature of the one who made the threat. Moreover, it would not imply a general reputation. Here,

however, Ernest Malizia just by being Ernest Malizia was a threat to the safety of those who crossed him. No more damning implication could be attributed to any accused. It is also likely that the jury, in some way, attributed the threat to appellant and this indicated his guilt.[6]

Appellant's character was thereby made an issue even though he did not testify. That this testimony may, technically, have been an exception to hearsay, did not render its admission into evidence proper.

This is so for two reasons: first, as stated above, it placed appellant's character in issue when he chose not to testify; and second, the probative value was nil and the prejudice great. cf. United States v. Pacelli, 491 F.2d 1108 (2d Cir., 1974).

While this testimony was evidently sought to ward off defense arguments it was presented on the government's case-in-chief.

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, but it simply closes the whole matter of character, disposition and reputation on the prosecutor's case-in-chief. The state may not show defendant's prior trouble with the law. Specific criminal acts, or ill name among his neighbors, even though such facts might

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6. The court never instructed the jury as to the limited purpose of this line of questioning.

> logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice (footnotes and citations omitted) Michelson v. United States, 335 U.S. 469 at 475-76 (1948).

United States v. Modern Reed & Rattan Co., Inc., 159 F.2d 656, 658 (2d Cir.,) cert. denied 331 U.S. 831 (1947); United States v. James,208, F.2d 124 (2d Cir. 1953); See, United States v. Smith, 283 F.2d 760, 763 (2d Cir., 1960), cert. denied 365 U.S. 851 (1961).

> ... the search for the truth should be the lodestone. Now in this search there are of course areas of irrelevancy where matter is kept from the jury because the danger of prejudice exceeds its probative force. United States v. Apuzzo, 245 F.2d 416 at 421 (2d Cir.) (en Banc), cert. denied, 355 V.S. 831 (1957)

See, United States v. Harrington, 490 F.2d 487, 490 (2d Cir., 1973).

This is exactly the situation we have here. The state of mind of Gerstenfeld was, despite Judge Motley's assertion to the contrary, irrelevant to the issue of whether any inferences could be drawn from Gerstenfeld's absence.

That this evidence was not directly offered as bearing on guilt or innocence in no way diminishes its impact. It is hard to believe that the prosecution was unaware of the added benefit of this testimony.

In analogous areas, the courts have been extremely careful to keep from the jury any evidence which would reflect on the character or reputation of a defendant. This has been so even where there is probative evidence involved. Cases involving photographs or fingerprints used for identification demonstrate this. Even when important to the government's case such items must be utilized in a manner which does not imply or inform the jury of the defendant's bad character. e.g., United States v. Harrington, 490 F.2d 487 (2d Cir. 1973); United States v. Tomaiolo, 249 F.2d 683 (2d Cir., 1957); Leigh v. United States, 308 F.2d 345 (CADC, 1962).

Revealing a past criminal record is only one way this can be done. The principle set down in Michelson is not and should not be limited to this alone. This evidence was unnecessary, objected to, and highly prejudicial. On this alone a reversal is required.

It is true that defense counsel went over this area on cross-examination, but this was clearly to try to overcome the harm already done. This cannot be considered as nullifying the error or rendering it less prejudicial. See, United States v. Modern Reed & Rattan Co., Inc., supra, at 658.

It should also be pointed out that despite the ''window dressing'', this case was not one of overwhelming proof of guilt. In truth, it turned entirely on credibility issue. Vecchione, Gross and Kayner testified that they looked into the luncheonette and saw various portions of a transaction between Gerstenfeld and Malizia. The Peterson's, testifying for the defense, stated that this could not have occurred as testified to by the agents.[7]

There were no photos, no tapes, no fingerprints, nothing but the word of the agents. While the absence of such evidence may have been explained, this does not raise the level of proof. That level was hardly overwhelming.

From any viewpoint, appellant was severely prejudiced and should be granted a new trial free from such taint.

Operation Flanker

This was not all the prejudicial evidence of this nature erroneously allowed into evidence. Over objection, the prosecution was permitted to elicit testimony to the effect that appellant was the target of ''Operation Flanker''. Again the use of this was totally unnecessary. There was no need to inform the jury of

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7. The jury during its deliberation requested Mr. Peterson's testimony (599).

this. Its only purpose was to stress the significance of appellant's criminal acts. That the government chose to title this operation is not evidence. It does not prove anything. Yet a juror hearing this could believe only that this was a big case involving important criminals.[8] It was, of course, used to establish the government's characterization of Malizia and his activities. This use was improper. Again Malizia's character was called into question. The reasoning and cases cited previously apply to this testimony as well. See, United States v. Brown; 451 F.2d 1231, 1235 (5th Cir., 1971); United States v. Marrero, 486 F.2d 622, 625-27 (7th Cir., 1973).

Malizia's Fingerprints

In attempting to prevent Malizia from deriving any benefit from the absence of fingerprints on the contraband, the government showed through the testimony of Kayner and King that it had checked for fingerprints and found no readable ones. This was all that was required to spike any defense argument. But, this did not satisfy the government. The jury was told, on two separate occasions, that Malizia's prints were taken to be

8. This was reinforced by Judge Motley's repeated references in the charge to possession by appellant of a large quantity of drugs (587, 589, 590).

checked against a partial print found on the innermost bag in which the narcotics were found. Kayner stated that these prints were taken from those on file at the Bureau of Narcotics and Dangerous Drugs. Thereby, unmistakeably intimating prior criminal conduct on the part of Malizia. Again, this was totally unnecessary. This was not an identification of Malizia by his fingerprints. The prints were used only to show the reason why there was no fingerprint evidence at trial. It would have been sufficient to prove that tests were run and that no readable prints were found. To tell the jury that Malizia had fingerprints on file at the Bureau of Narcotics and Dangerous Drugs, only prejudiced Malizia cf. United States v. Kaufman, 453 F.2d 306, 311 (2d Cir. 1971).

To this, no objection was taken. Even if one had been taken, the effect of the testimony would not have been diminished. Appellant contends this was plain error.

As pointed out previously:

> If, at his trial, a defendant does not take the witness stand in his own defense, or if he has not himself been responsible for causing the jury to be informed about his previous convictions, he is entitled to have the existence of any prior criminal record concealed from the jury. The defendant's right to this protection is so well understood that discussion of it is unnecessary. United States v. Harrington, 490 F.2d 487 at 490 (2d Cir., 1973).

There are two basic types of factual patterns which raise this issue: Namely, where there is direct evidence of previous convictions or where the previous conflicts with the law are inferred from other evidence.

Cases dealing with the first type are only helpful in stating the general right of a defendant to be tried by a jury untainted by such evidence.

It is the second type of case which is pertinent here. Most of these cases themselves fall into three categories. One, ''mug shots'' or photographs; two, fingerprints; and three, prior imprisonment of the defendant.

''Mug shot'' cases are factually the least applicable here, but because they are the most common, some discussion is required.

The problem usually arises, as it did in United States v. Harrington, supra, where a photograph is used to assist an in-court identification. Normally, this would present no problem. The difficulty arises where a ''mug shot'' is used. No inference of prior criminality arises from a mere photograph of a defendant being in the possession of the government. The possible sources for a photograph are unlimited and one would not usually associate possession by the government of one's photograph with a criminal record. See, United States v. Dichiarinte, 385 F.2d 333, 337 (7th Cir.

1967), cert. denied sub nom., Mastro v. United States, 390 U.S. 945 (1968).

There are times, however, when:

> ...the introduction of photographs of a defendant may well be equivalent to the introduction of direct evidence of a prior criminal conviction ... and so deprived the defendant of his right to a fair trial. United States v. Harrington, supra, at 490.

e.g. Barnes v. United States, 365 F.2d 509, 510 (D.C. Cir., 1966) (involving a typical ''mug shot'' with the numbers covered by adhesive tape and writing on the back covered with paper); United States v. Reed, 376 F.2d 226 (7th Cir., 1967) (''mug shots'' described as ''photographs of former inmates of state prison.''); United States v. Harmon, 349 F.2d 316, 320 (4th Cir., 1965); United States v. Harrington, supra, (incompetently masked ''mug shot'').

In Harrington, this court, after reviewing the above cases, formulated three prerequisites to the introduction of ''mug shot'' type photographs:

1. The government must have a demonstrable need to introduce the photographs; and

2. The photographs themselves, if shown to the jury, must not imply that the defendant has a prior criminal record; and

3. The manner of introduction at trial must be such that it does not draw particular attention to the source or implications of the photographs. 490 F2d at 494

This analysis is equally applicable to the use of fingerprints or to testimony about their use.

Those cases dealing with references to prior imprisonment almost always hold such references to be prejudicial error. The reason is that the inference of prior criminality is unavoidable. e.g. United States v. Tomaiolo, 249 F.2d 683 (2d Cir., 1957); United States v. Gray, 468 F.2d 257 (3d Cir., 1972); United States v. White, 355 F.2d 909 (7th Cir., 1966).

The usual use of fingerprint cards, etc., is to identify the defendant as the perpetrator of a crime. For this purpose, such evidence has been consistently upheld. Moon v. State, 198 P.288 (Ariz. Sup. Ct., 1921); State v. Viola, 82 N.E. 2d 306 (Ct. App. Ohio, 1947) app. dismd., 86 N.E. 2d 715, cert. denied 334 U.S. 816; State v. Jackson, 200 S.E. 2d 626 (Sup. Ct. N.C., 1973)

These cases, like Harrington, require that there be a valid purpose for such evidence and it must not imply prior criminal conduct. State v. Jackson, supra at 633.

Turning to this case, it is obvious that the requirements set down in Harrington and which should apply here, have not been met.

First, there was no demonstrable need to say anything about Malizia's prints or from where they were obtained and second, the existence of such fingerprints and

that they were filed with the Bureau of Narcotics and Dangerous Drugs clearly implied a criminal record. The first ground has previously been covered, the second, requires further discussion.

Fingerprint cards are different from photographs as far as the implication of prior criminality. Photographs can be obtained through non-governmental sources and are readily available. Fingerprints imply governmental action of some sort. Ordinary people do not take fingerprints, they do take photographs. Thus, the jury knowing Malizia had a fingerprint record must necessarily have known that they were taken by some governmental agency. They were informed that the agency which possessed them was the Bureau of Narcotics and Dangerous Drugs; to assume they did not reach from this fact any inference of prior criminality is ludicrous. The admission of this evidence was error.

This was not a situation where the jury could have believed the prints came from the instant arrest, since the government clearly showed that Malizia was arrested long after his fingerprints were used by Kayner (February 19, 1971). See United States v. Calarco, 424 F.2d 657 (2d Cir.,), cert. denied, 400 U.S. 834 (1970). The same is so for the arrest on the traffic violation in Rockland County.

Nor was the testimony inadvertant, Mikus v. United States, 433 F.2d 719 (2d Cir., 1970); Parker v. United States, 404 F.2d 1193 (9th Cir., 1968), cert. denied 394 U.S. 1004, reh. denied 395 U.S. 941, or unresponsive, United States v. Sidman, 470 F.2d 1158 (9th Cir., 1972), cert. denied 93 S. Ct. 948 (1973). It was brought out by the prosecution, United States v. Stromberg, 268 F.2d 256 (2d Cir. 1959), cert. denied sub nom., Lessa v. United States, 361 U.S. 863, which was not merely responding to a defense trial tactic. United States v. Borkenhagen, 468 F.2d 43 (7th Cir., 1972), cert. denied 410 U.S. 934. Nor did defense counsel ''open the door''. United States v. Iannelli, 477 F.2d 999 (3d Cir., 1973), U.S. App. Pndg.

The crucial question then becomes: Was this plain error?[9] Appellant claims that it was. The primary considerations are, the nature of the right injured by the error and whether bringing it to the court's attention could have cured it, either by striking or by curative instructions.

There can be no question that the right involved is an important one. United States v. Harrington, 490

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9. Federal Rules of Criminal Procedure, Rule 52(b).

F.2d 487 (2d Cir., 1973); cf. Marshall v. United States, 360 U.S. 310 (1959).

It is also clear, that nothing could have been gained if Judge Motley had been apprised. To strike the testimony would have done nothing.

As to the effect of curative instructions:

> The naive assumption that prejudicial effects can be overcome by instructions to the jury ... all practicing lawyers known to be an unmitigated fiction ... (footnotes omitted) Krulewitch v. United States, 336 U.S. 440 at 453 (1949) (concurring opinion of Jackson, J.)

Bruton v. United States, 391 U.S. 123 (1968); United States v. Clarke, 343 F.2d 90 (3d Cir., 1965); United States v. Nemeth, 430 F.2d 704, 706 (6th Cir., 1970); United States v. Rudolph, 403 F.2d 805, 807 (6th Cir., 1968); Maestas v. United States, 341 F.2d 493, 495-96 (10th Cir., 1965); Mora v. United States, 190 F.2d 749, 752-53 (5th Cir., 1951).

Appellant does not assert that curative instructions have no validity, only that they are a limited tool. There was nothing Judge Motley could have said to soften the effect of this evidence on the minds

of the jurors.[10] In fact, further comment may just have made matters worse. For these reasons, the introduction of the testimony concerning Malizia's prints was plain error. See, United States v. Gray, 468 F.2d 257, 261 (3d Cir., 1972).

In conclusion, we should not lose sight of the cumulative effect of the foregoing on the jury.[11] Without resort to any evidence pertaining to guilt or innocence, the jury knew that Malizia was a man to be feared, with a reputation as a killer; that he had prior conflicts with the Bureau of Narcotics and Dangerous Drugs, which necessarily involved drugs; and that he was thought of by the government as an important criminal.

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10. Certainly, Judge Motley's fingerprints are not on file with the Bureau of Narcotics and Dangerous Drugs. See, United States v. Robinson, 406 F.2d 64, 64-65 (7th Cir., 1969), cert. denied 395 U.S. 926.

11. Agent Vecchione testified that on February 16, 1971 he instructed Gerstenfeld to "complete negotiations for the purchase of 1 kilogram of cocaine on the following day from either Mr. Ernest Malizia or Mr. Joseph Malizia." (18) This was objected to as hearsay, which it was. Some background hearsay may be necessary but the portion of this testimony which identified the prospective sellers was not needed. It would have been sufficient to state that instructions to complete a transaction were given. The identity of those involved should have been established by competent, non-hearsay testimony alone. The prejudice from this is not as great as that arising from the other evidence discussed above. Appellant, however, contends it was erroneous to admit this testimony and wishes to call it to the court's attention.

This was hardly conducive to a fair appraisal by the jury of Malizia's guilt[12] and requires that he be granted a new trial.

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12. It should also be noted that a charge on reasonable doubt almost identical to that given here was characterized by this court as incomplete. United States v. Barrera, 486 F.2d 333, 339-40; 339 n.2 (2d Cir., 1973)

POINT II

THE DISTRICT COURT'S CHARGE TO THE JURY THAT THE CASE MUST BE DECIDED CONSTITUTED PREJUDICIAL ERROR.

In her original instructions to the Jury, the trial judge stated:

> Now, the logical result of that application (of the law, as stated in the instructions, to the facts) certainly is a verdict in the case. As we have already pointed out, ... this is an important case to both the government and defendant, and therefore since it is an important case, it must be decided. (573-574)

Later in the charge, the judge advised the Jury:

> As you deliberate, ladies and gentlemen, please be careful to listen to the opinions of your fellow jurors as well as to ask for an opportunity to express your own views. No one juror holds the center stage in the jury room and no one juror controls or monopolizes the deliberations.
>
> If after listening to your fellow jurors and if after stating your own view you become convinced that your view is wrong, do not hesitate because of stubbornness or pride of your opinion to change your view, if you become convinced your original view was wrong.
>
> On the other hand, do not surrender your honest conviction solely because of the opinion of your fellow jurors or because you are outnumbered.
>
> Now, because this is a federal court, your verdict in this case must be unanimous. It must reflect the conscientious conviction of each and every one of you. (594-95)

After the entire charge, defense counsel specifically objected to that portion of the charge which told the Jury that the "case must be decided." (595). The Court, however, ignored the objection. The case was then given to the Jury. The time was 9:20 P.M., and it was a Friday night preceding a holiday weekend (Washington's Birthday). At 11:22 P.M. the Jury returned with its verdict of guilty.

The language set out above constitued an Allen[13]-like charge and will be referred to as such in the brief. The language used and the setting in which it was given render it a clearly coercive charge requiring reversal.

The history of the Allen charge is replete with judicial criticism. Its use has been approved only grudgingly, with deep reservations, and in limited circumstances.

The use of this type of charge in this case presents a somewhat novel variation. It is also somewhat surprising that after so much has been written on the subject this language would still be used.

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13 Allen v. United States, 164 U.S. 492 (1896).

The areas of inquiry in this case are:

1) Were the statements that ''the logical result . . . certainly is a verdict in this case'', and that the ''case must be decided'', coercive per se?;

2) Was this coerciveness mitigated by any other portions of the charge? and

3) Were these statements coercive in the setting in which they were made?

It is appellant's claim that the charge was coercive both on its face and as applied, and that nothing said by Judge Motley mitigated that effect.

This area of law is a familiar one and there have been numerous cases in all jurisdictions dealing with it.

The basic argument surrounding the Allen charge is whether it is legitimate guidance or coercive interference.

The coercive elements which the Allen - type charge may produce may be either substantive or circumstantial. Substantive coercion occurs when the language of the charge itself is coercive. Where it contains a misstatement of fact or a statement that the Court has no authority to make, regardless of how a Jury might react. Am. Crim. L.R. 10; 637, 655-56

(Spring, 1972). Circumstantial coercion relates primarily to the particular setting and circumstances in which such a charge is given.

In this case both elements are present.

Substantive Coercion

Judge Motley's charge informed the Jury that this was an important case and that because it was important, it had to be decided. This was erroneous. Jenkins v. United States, 380 U.S. 445 (1965); United States v. Bailey, 468 F.2d 652, 663 (5th Cir., 1972); United States v. Harris, 391 F.2d 348, 355 (6th Cir., 1968) cert. denied 393 U.S. 874.

While a Jury need not be informed that it can properly be unable to reach a decision, such a result is part of our system of criminal justice. cf. United States v. Bowles, 428 F.2d 592, 596 (2d Cir., 1970), cert. denied 400 U.S. 928. The requirement of impartiality, unanimity, and the reasonable doubt standard require that an accused be entitled to a hung jury. A verdict of guilty is not possible unless each of the twelve jurors is convinced in his own mind of guilt beyond a reasonable doubt. Implicit in this is the right to a hung jury. If all twelve jurors cannot agree, the jury must return a verdict of undecided. United States v. Fioravanti, 412 F.2d 407, 416 (3d Cir.,) cert. denied

396 U.S. 837 (1969); Thaggard v. United States, 354 F.2d 735, 739-41 (5th Cir. 1965) Coleman, J. concurring) cert. denied 383 U.S. 958; Huffman v. United States, 297 F.2d 754, 759 (5th Cir., 1962) (Brown, J., dissenting), cert. denied, 370 U.S. 955 (1962).

In Jenkins v. United States, supra, the judge informed the jury, ''You have got to reach a decision in this case.'' This charge was a misstatement of the law and was, under the circumstances of that case, held by the Supreme Court to be coercive. See, Powell v. United States, 297 F.2d 318, 320 (5th Cir., 1961) (''You ought to be able to reach a verdict''). At the very least it was an incorrect statement of the law, a statement which told the jury they must do something that was not, in fact, required.

Here, the charge was even more improper because it said, without explanation, that the importance of the case demanded a verdict. The clear implication was that the case was an especially important one to the government; with all the speculation to which such a possibility gives rise. The attempt to balance this element by stating that the case was also important to defendant failed, because every criminal case is important to an accused. The same cannot, in the same sense, be

1966); cf. Jenkins v. United States, 380 U.S. 445 (1965).

In this case, Judge Motley's admonishment that the case must be decided was given in the original charge.

Several cases have held that an Allen - like charge is less likely to be prejudicial if given in the original instructions or prior to, rather than after, the Court being apprised that the jury cannot reach a verdict. e.g. Nick v. United States, 122 F.2d 660, 674 (8th Cir. 1941) cert. denied 314 U.S. 687; Fulwood v. United States, 369 F.2d 960 (CADC 1966) cert. denied 387 U.S. 934; People v. Iverson, 9 Ill. App. 3d 706, 292 N.E. 2d 908 (App. Ct., 2d Dis., 1973); Kelly v. State, 310 A.2d 538 (Md. Ct. App., 1973); See United States v. Martinez, 446 F.2d 718, 719 (2d Cir., 1972), cert. denied, 404 U.S. 944.

Those cases are distinguishable. In Nick v. United States, supra, the court was referring only to that portion of the Allen charge relating to the obligation of the minority to listen to the majority. In Fulwood v. United States, supra, at 962-963, the Instructions were to the effect that the jurors should keep an open mind and weigh the arguments of their peers. The

charge also included a statement that the judge hoped the jury would be able to decide the matter. This was upheld since it was expressed as a hope. See United States v. Johnson, 432 F.2d 626, 632-633 (CADC., 1970) cert. denied 400 U.S. 949.

In People v. Iverson, supra, at 910-11, the court was clearly addressing itself to the, ''heed the majority'', portion of the Allen charge.

In Kelly v. State, supra, at 542, the charge was to the effect, ''... you must decide whether or not you can reach a verdict in this case.'' as well as the general duty to listen to the other jurors.

See, United States v. Marcey, 440 F.2d 281, 286 N.27 (CADC., 1971); Burroughs v. United States, 365 F.2d 431, 434 (10th Cir., 1966); Burrup v. United States, 371 F.2d 556, 558 (10th Cir., 1967), cert. denied, 386 U.S. 1033.

It is arguable that that portion of the Allen charge which instructs the jury to ''heed the majority'' has a greater coercive force when, in fact, there is a majority to heed. Whether this is correct is debatable since such a charge could dissuade a minority from ever forming. Green v. United States, supra.

The timing of the charge, however, merely diminishes the coercion, but does not eliminate the

possibility. People v. Iverson, supra, at 911 n.2.

The determination of the above is not crucial to this case. Here, appellant complains of that portion of the charge directing the jury to return a verdict. As to this the timing is not significant. When a jury is told that they must reach a verdict, the impact is not only to coerce a minority out of its already held views, but clearly impedes the very formation of a minority view. Green v. United States, supra at 856. A juror faced with 10 or 11 jurors in agreement may well yield before he even forms an opinion. If the juror believes that a verdict must be reached, it is highly unlikely that he would assume that he could convince all the others to share his viewpoint. Requiring a verdict tends to strengthen the majority at the expense of the minority throughout the deliberations. Furthermore, here the verdict was reached only two hours after the charge so that it is unlikely that the effect of the charge dissipated.

The rest of the charge did not cure this coercion.

There have been numerous cases before this court where the potentially coercive effect of the Allen charge has been held to have been obviated by other

language in the instructions. Such is not the situation presented here. At the end of the charge, Judge Motley told the jury:

> On the other hand, do not surrender your honest conviction solely because of the opinion of your fellow jurors or because you are out numbered.14a
>
> Now, because this is a federal court, your verdict in this case must be unanimous. It must reflect the conscientious conviction of each and every one of you. (emphasis supplied)

This is totally inadequate to mitigate the coercive effect of the earlier directive; that the case ''must be decided''.

> Such a charge, so long as it makes plain to the jury that each member of the jury has a duty conscientiously to adhere to his own honest opinion and avoids creating the impression that there is anything improper, questionable, or contrary to good conscience for a juror to cause a mistrial, ... is still a permissible charge to be given in proper circumstances ... (emphasis supplied). Thaggard v. United States, 354 F.2d 735, 739 (5th Cir. 1965) cert. denied, 383 U.S. 958.

The cases in this circuit apply a similar standard to that set out in Thaggard.

This case presents a somewhat different situation than those previously dealt with by this court. Usually, the Allen charge is given in the appropriate (or a slight variation). The coercion alleged is implied and arises out of the general language (or the

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14a. The use of the word ''solely'' implies there are times when an honest conviction should be surrendered.

variation) of the Allen charge. This court has repeatedly held, under the above circumstances, that where the judge made it clear to the jury that none of them should yield his conscientious judgment, the charge was not coercive.

In relation to this case, the cases decided by this court have in common two distinctions: first, in none of those cases was the language used nearly as coercive as that used here and, second, in all of those cases the language used to inform the jury that they did not have to yield conscientiously held views was clearer and in almost all instances much more thorough.[15] A look at the cases decided by this court substantiates this.

In United States v. Tolub, 309 F.2d 286 (2d Cir. 1962) the charge given was taken directly from the language of the Allen opinion. It included no language telling the jury the case had to be decided. In fact, the judge told the jury:

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15. Compare §5.4(a), ABA, Standards Relating to Trial by Jury; Instructions 8.11, Jury Instructions and Forms for Federal Criminal Cases, 27 FRD. 39, 97-98 (1961); United States v. Gordon, 196 F.2d 886-891-2 (7th Cir.) rev'd. on other gds. 344 U.S. 414 (1952); United States v. Barnhill, 305 F.2d 164 (6th Cir.) cert. denied 371 U.S. 865; 1962; Kawakita v. United States, 190 F.2d 506 (9th Cir. 1951) aff'd 343 U.S. 717 (1952); United States v. Brown, 411 F.2d 930 (7th Cir. 1969) cert. denied 396 U.S. 1017; United States v. Bailey, 468 F.2d 652, 663 (5th Cir. 1972).

See, note 14a, supra.

> Remember at all times that no juror is expected to yield a conscientious conviction he or she may have as to the weight or effect of evidence, but remember also that after full deliberation and consideration of all the evidence, it is your duty to agree upon the verdict if you can do so without violating your individual judgment and conscience. (emphasis supplied).

United States v. Kahaner, 317 F.2d 459, 483-484 (2d Cir.) cert. denied, sub nom Corallo v. United States, 375 U.S. 835 (1963), is similar to Tolub. The trial judge, however, went much further in making it clear that he was not requiring the jury to reach a verdict. ''it is desirable if a verdict can be reached''. ''... under no circumstances must any juror yield his conscientious judgment'', 317 F.2d at 483-84.

United States v. Curcio, 279 F.2d 681 (2d Cir.) cert. denied 364 U.S. 824 (1960). (The jury was told it was their duty to decide the case if they could conscientiously do so). United States v. Thomas, 282 F.2d 191 (2d Cir. 1960). (''It is your duty to decide this case, if you can do so conscientiously.'').

United States v. Rao, 394 F.2d 354, 356 (2d Cir. 1968) cert. denied 393 U.S. 845, the portion of the charge alleged to be coercive was:

> I do not mean to say or suggest or intimate that, if after doing that (deliberating some more), a juror is absolutely

> convinced that the majority is wrong, that he or she has not the right to abide by his or her own judgment.

The judge, however, had in the preceding sentences told the jury:

> Of course, in the end every juror must answer to his or her conscience, that is, to do what he or she thinks is right, but every juryman must make an honest endeavor to see the point of view of the other men and women on the jury; to keep his or her mind absolutely open and not to get into an obstinate state of mind. You should attempt, as far as you honestly can, to give the most careful thought to what a majority of your colleagues on the jury believe to be the solution.

And in conclusion, the judge stated:

> I want to repeat that it is not my desire to coerce any juror to decide the case against his or her best judgment. I do not intimate in the slightest that a juror should abandon his personal conviction.

This court held that viewed as a whole, this charge was not coercive. Also, United States v. Kenner, 354 F. 2d 780, 782-84 (2d Cir. 1965), cert. denied 383 U.S. 958. (Where only the judge's express disclaimer of any intention to coerce saved the judgment from reversal).

In United States v. Meyers, 410 F.2d 693, 696 (2d Cir. 1969), cert. denied 396 U.S. 835, reh. denied 396 U.S. 949, the pertinent portion of the charge was:

> It is desirable if a verdict can be reached that this be done both from the viewpoint of

> the defendant and the government, only, however, if the verdict reflects the conscientious judgment of each juror and under no circumstances must any juror yield his conscientious judgment.
>
> This court has no purpose to ask and indeed does not have the right to inquire as to how you stand. But considering the length of the trial, the amount of testimony that was taken, the number of witnesses that have been heard and the prospect of another trial before another jury chosen in the same manner as you have been selected if you fail to agree, further consideration on your part is fully justified.

In United States v. Barash, 412 F.2d 26, 31 n. 9 (2d Cir., 1969) cert. denied 396 U.S. 832, the charge stated:

> As I took pains to emphasize to the jurors in my instructions on yesterday, you should never surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of other jurors or for the mere purpose of returning a verdict. But it is your duty as pointed out yesterday, and I point out today, to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to your individual judgment.

In United States v. Hynes, 424 F.2d 754, 756 n.2 (2d Cir., 1970), cert. denied 399 U.S. 933, the court told the jury:

> It is desirable, if a verdict can be reached, that this be done, both from the viewpoint of the government and of the defendant.

> This, of course, means only a verdict that reflects the conscientious judgment of each juror.
>
> * * *
>
> Remember also-and I emphasize this-that no juror must vote for any verdict unless, after full discussion, consideration of the issues and exchange of views, this represents his or her considered judgment.
>
> * * *
>
> ... but please remember that you review the evidence and you vote finally according to your conscientious judgment.

United States v. Martinez, 446 F.2d 118, 119 (2d Cir. 1971), cert. denied 404 U.S. 944. (Similar to United States v. Hynes, supra, but defense counsel took no objection to the supplemental charge). United States v. Cassino, 467 F.2d 610, 619, (2d Cir. 1972) cert. denied 410 U.S. 913, 928, 942 (''... you must reach an agreement ... if you can do so without violence to your own individual judgment''); United States v. Jennings, 471 F.2d 1310, 1313 (2d Cir., 1973), cert. denied 411 U.S. 935. (''... you have an obligation to attempt to agree on a verdict'', and not to ''arbitrarily and capriciously give up what (you feel) to be a proper verdict ... for the sake of unanimity.'')

The same has applied where language in the charge informed the jury that, ''our law requires a retrial

unless the jury is unanimous''. United States v. Domenech, 476 F.2d 1229, 1232 (2d Cir., 1973), cert. denied -- U.S. -- ; United States v. Tyers, 487 F.2d 828, 832 (2d Cir., 1973); See, United States v. Meyers, 410 F.2d 693, 696 (2d Cir., 1969), cert. denied 396 U.S. 835.

A most instructive case is United States v. Bowles, 428 F.2d 592 (2d Cir., 1970), cert. denied 400 U.S. 928. There, appellant claimed that the Allen charge resulted in a forced verdict. This court stated:

> Bowles' contention is that the supplemental instruction had a coercive impact, resulting in a forced verdict.
>
> * * *
>
> We cannot accept this argument. No specific words are required if jurors are properly instructed that each juror's vote must reflect his considered judgment as to how the case is to be decided. If the jurors follow such an instruction, as it must be presumed they will, each vote will be for either conviction or acquittal and one of three decisions will necessarily result: (1) not guilty; (2) guilty; or (3) disagreement. The right to disagree is implicit.
>
> * * *
>
> So long as the supplemental charge does not operate coercively upon jurors ... An implicit instruction to vote for a disagreement is not proper.
>
> Here, the court instructed the jurors to ''make an individual judgment ...'' and emphasized the duty to reach a verdict according to the dictates of conscience when, at the end of the instruction, he stated:

> "I don't indicate by that that I want you to bring in a verdict of guilty or innocent, either one. Whatever you do is your own business in accordance with your own conscience, but I think you should be able to arrive at a verdict."
>
> This final word can hardly be called coercive. The Judge did not require the jurors to yield their views; he did not order them to reach a verdict. He did no more than to state his own judgment that a verdict could, upon further deliberation be reached. (Emphasis supplied) (Footnotes omitted) 428 F.2d at 595-96.

It is clear, from the foregoing cases, especially, United States v. Bowles, supra, that the charge in this case was coercive. It resulted in a forced verdict. The right to disagree which was found to be implicit in the language of the charge in Bowles was specifically removed from the jury by Judge Motley's instructions. This is a case where the jury was, indeed, ordered to reach a verdict.

There is also the more technical objection to the language of the charge itself. This type of charge is one fraught with pitfalls. The unfortunate fact is that the rights involved are important ones. The possibility for error is great and so is the harm. Harm which is done directly to the fact finding process.

Because of this, it is the best practice, if the charge must be used, to require strict adherence to an approved formulation. Not a slavish adherence, but an

adherence nonetheless. This has frequently been recognized by the courts.

The simple, short sentence telling the jury that ''the case must be decided'' went far beyond any acceptable formulation. It is unacceptable because it is erroneous and it interferes with free deliberation.

Or to use this court's phrase; this sentence was an ''aggravating circumstance'', because it relied on ''compromising language outside the Supreme Court statement in Allen.'' United States v. Hynes, supra at 757.

This could so easily have been avoided. The issue was clearly presented to Judge Motley and she let the charge stand without even verbalizing her decision.

In light of this court's opinion in United States v. Kenner, 354 F.2d 780, 782-84 (2d Cir., 1965), cert. denied, 383 U.S. 958, as well as Hynes, the language used by Judge Motley by itself requires reversal. At least two courts have interpreted Kenner as requiring a strict formulation of the Allen charge, which is not to be varied or altered by a trial judge. United States v. Bailey, 468 F.2d 652, 667 (5th Cir., 1972); United States v. Angiulo, 485 F.2d 37, 40 n. 2 (1st Cir. 1973).[16]

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16. On the strict formulation requirement, see, United States v. Harris, 391 F.2d 348, 355 (6th Cir., 1968) cert. denied 393 U.S. 874; United States v. Pope, 415 F.2d 685, 691 (8th Cir., 1969), cert. denied 397 U.S. 950; Sullivan v. United States, 414 F.2d 714 (9th Cir., 1969; Fulwood v. United States, 369 F.2d 960, 963 (CADC 1966), cert. denied 387 U.S. 934; United States v. Rogers, 289 F.2d 433 (4th Cir. 1961); Goff v. United States, 446 F.2d 623, 626 (10th Cir., 1971).

Kenner may not explicitly say this, Hynes, however, implies it. In any event, it is a workable rule in a difficult area.

Here, Judge Motley's charge forced a verdict. Inherent in this was the requirement that any minority view must, sooner or later, yield. This invaded the proper deliberations of the jury to an intolerable degree and denied appellant a fair trial.

Circumstantial Coercion

When the Allen - type charge is viewed in the context of this case, the prejudice is even more readily apparent. Here, after the charge, defense counsel specifically objected. Yet, Judge Motley did nothing to diminish or correct the impact of her erroneous statement that the case had to be decided. It is hard, in retrospect, to understand her refusal to say anything further to the jury on this issue.

Moreover, this case was given to the jury at 9:20 P.M. on a Friday preceding a holiday weekend.[17] The jury which had been told they must reach a verdict and probably anxious to begin their holiday, was not a jury disposed to long deliberations. Since the

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17. Judge Motley's position that this was the fault of defense counsel is untenable. Even if court had not been adjourned an hour early on the day before, it still would not have made any significant difference on when the jury began its deliberation. Previously, Judge Motley showed no reluctance to having the case go over to Saturday (271).

case had to be decided, better sooner-thereby preserving the holiday-than later. As pointed out in Point I, this was not a case of overwhelming proof of guilt, but was in fact a case entirely based upon credibility. These factors elevated the coercion inherent in the charge to an even more intolerable level.

For these reasons, appellant contends that his Sixth Amendment right to a fair trial, his right to a unanimous jury verdict, his right to fair and impartial jury deliberations, and his right to have his guilt determined beyond a reasonable doubt (as well as his right to the presumption of innocence) were all denied to him and that a reversal of his conviction is required.

POINT III

THE COURT ERRED WHEN IT PERMITTED EVIDENCE OF MALIZIA'S FLIGHT AS TENDING TO SHOW A GUILTY STATE OF MIND WITH RESPECT TO THIS PARTICULAR OFFENSE.

On April 13, 1974, immediately preceding the trial, a hearing was held. During this hearing defense counsel apprised the court of his objections to the introduction of prosecution evidence tending to show that Malizia fled to avoid prosecution in this particular case. Judge Motley ruled in favor of the government. During trial, the government, over renewed objection of defense counsel, offered evidence that Malizia, after February 24, 1974, did not return home, that he used a false identification and jumped bail on a Rockland County traffic charge, and that when arrested on this case he was carrying false identification. This was error.

Here, the first attempt to arrest Malizia was made on February 24, 1971, a full week after the alleged sale. Moreover, no governmental official had informed Malizia prior to his arrest, that he was wanted or for what charge he was wanted.

The general rule is stated as:

> The intentional flight ... of a defendant immediately after the commission of a crime, or after he is accused of a crime, that has been committed ... may be considered by the jury ... in determining guilt or innocence. 27 F.R.D. 58.

Bailey v. United States, 410 F.2d 1209, 1217 (10th Cir., 1969), cert. denied 396 U.S. 933.

For two reasons appellant's pre-trial application should have been granted as to his activities after February 24, 1971. First, because he did not flee immediately after the commission of the crime and second, he was never informed of the charge against him so that his flight cannot be used in connection with the commission of the particular offense in question.

Given the nature of the business in which it was ableged Mr. Malizia engaged, a week's time is not insignificant. There may have been numerous supervening events to have caused him to follow the course of conduct which he did. None of them may have related to this charge. Certainly, a week later is not ''immediately''. See, e.g. Bailey v. United States, 410 F.2d 1209, 1217 (10th Cir., 1969), cert. denied 396 U.S. 933 (Defendant fled two days after he had learned a friend had been arrested); Shorter v. United States, 412 F.2d 428 (9th Cir., 1969) cert. denied 396 U.S. 970 (Defendant fled immediately after F.B.I. agents who had a warrant for defendant identified themselves and stopped defendant's car).

Moreover, here, there was no evidence that Malizia had been informed that he was wanted or for what he was

wanted. As stated in United States v. Embree, 320 F.2d 666, (9th Cir., 1963)

> Perhaps ... flight tends circumstantially, to prove that he was guilty of some crime. But since there is nothing in the record to indicate that he was informed before his attempted flight, that he was being sought in connection with the offenses involved in this case, such flight does not constitute an admission, or other evidence, that he is guilty of those crimes. at 668

The Ninth Circuit made it clear in Shorter v. United States, supra, at 430 that it is not a requirement that the government prove that a defendant knew of the particular charge. It did, however, state that the evidence of flight in Embree did not have sufficient probative value to amount to an admission of guilt. Such is the case here.

It is not necessary to fix a mechanical rule as to the necessary prerequisite to the admission of evidence of flight. Flight, however, may not be a reliable indication of guilt, Alberty v. United States, 162 U.S. 499 (1896), and its propriety has been questioned. Wong Sun v. United States, 371 U.S. 471, 483 n.10 (1963); United States v. Robinson, 475 F.2d 376, 384 (CADC, 1973); United States v. Telfaire, 469 F.2d 552 (CADC, 1973).

In light of the above and because flight may impress a jury[18] beyond its true value, this court should not permit its introduction where the basis is as tenuous as that presented here. Especially, as here, where the entire case turned on credibility.

For these reasons appellant contends that the introduction of the evidence of his flight requires a reversal of his conviction.

CONCLUSION

FOR THE REASONS STATED ABOVE THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND APPELLANT GRANTED A NEW TRIAL.

Respectfully submitted,

GOLDBERGER, FELDMAN & BREITBART

J. JEFFREY WEISENFELD
On the Brief

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18. Especially as here, where there was so much evidence pertaining to flight. That the flight itself was clearly proved has no effect on the degree of proof relating to the cause of that flight.

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 10 day of May, 1974 at No. Foley Sq. 7th Fl. deponent served the within Brief upon U.S. Attorney's the Appellee herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the appellee therein.

Sworn to before me,
this 10 day of May 1974

Edward Bailey

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1975